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Supreme Court of the United States

OCTOBER TERM, 1957.

No. 563

IN THE MATTER

of

The Arbitration of Certain Differences between
DEVIDAYAL (SALES) LTD.,

Petitioner,

and

IIDA & CO., NEW YORK, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND APPENDIX.

PETER BELSITO,
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New York 17, N. Y.

PETER BELSITO,
ARNOLD D. NAIDICH,
Of Counsel.

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IIDA & CO., NEW YORK, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Devidayal (Sales) Ltd. respectfully prays for a Writ of Certiorari to the Court of Appeals of the State of New York to review the Order of the said court remitted to the County Clerk of New York County and the judgment therein filed and docketed in the said County Clerk's Office of New York County, on the 22nd day of July, 1957, which affirmed the order of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department, entered in the Office of the Clerk of the Appellate Division, First Department, on the 9th day of October, 1956, which said judgment

unanimously affirmed the judgment of the Supreme Court, New York County, entered the 2nd day of November, 1955 in the Office of the Clerk of the County of New York in favor of the above named respondent, Iida & Co., New York, Inc.

Permission for leave to appeal to the Court of Appeals was granted by the Appellate Division of the First Department on December 11th, 1956, which certified "that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals."

The affirmance by the Court of Appeals of the State of New York contained no opinion.

Opinions Below.

Special Term summarily confirmed the award of the Arbitrator and denied the cross-motion to deny or modify the award, stating (fol. 678 of the Record):

> "The award of an arbitrator cannot be set aside for mere error of judgment as to the law or facts of the case submitted to him."

This summary confirmation was made in the face of the Arbitrator's statement in the award that he was rendering a legal opinion "as would a Justice of the Court trying the case without a jury" (fol. 599), in order that the award may be set aside or modified "if there is any palpable error of fact or law" (fol. 599).

The Appellate Division affirmed without opinion (fols. 703-711).

The Court of Appeals affirmed without opinion and the judgment docketed therein appears in the Appendix.

The decision of the arbitrator, William A. Hyman, Esq., appears in folios 574-677 and contains the statement of facts.

Jurisdiction.

The decision of the Court of Appeals of the State of New York sought to be reviewed, operates (1) to deny the petitioners the equal protection of the laws, and (2) to deprive them of their property without due process of the law.

The said decision of the Court of Appeals affirmed the order of the Appellate Division, and the judgment entered thereon was filed and docketed on the 22nd day of July, 1957 in the Office of the Clerk of the County of New York (Appendix).

There has been no order respecting a re-hearing and there has been no extension of time within which to petition for Certiorari.

The jurisdiction of this Court is invoked under 28 U. S. C. A., section 1257, subd. 3, as amended by the Act of June 25, 1948, C. 646, Stat. 929.

Questions Presented for Review.

Does the decision of the New York Court of Appeals operate to deny to the petitioners the constitutional guarantees of the 14th Amendment?

Is the applicable law which should be applied to the facts in this case the law in force in India, the situs of the execution of the contract whose breach is alleged?

Can the improper application of the law of New York by the Arbitrator be held to be conclusive where the Arbitrator intended to decide in accordance with law but did not do so?

Are damages fixed and definitely settled immediately upon an absolute breach of the contract when the seller refused to deliver?

Constitutional Provisions and Statutes Involved.

United States Constitution, Amendment 14, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York State Constitution, Article 1, Section 11:

> "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. • • •."

Section 148 New York Personal Property Law:

> "Action for failing to deliver goods—
>
> 1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.
>
> 2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.
>
> 3. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

Section 1462 . . . New York Civil Practice Act:

> ". . . the Court must make an order vacating the award . . . (4) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made."

Section 39 Indian Contract Law:

> "When a party to a contract has refused to perform . . . the promisee may put an end to the contract, unless he has signified . . . his acquiescence in its continuance."

Statement of the Case.

The parties entered into a written contract on December 8, 1954, for the sale by Petitioner to Respondent of 8,000 long tons, 10% more or less at seller's option, of Indian Manganese Ore. • • • Shipment was to be made during January/March 1955, in minimum monthly quantities of 2500 tons or alternatively as one shipload, at seller's option, in liner or charter vessel at seller's option (fols. 603-604, 438-442).

The Arbitrator stated that his opinion was a part of the award to which it was attached (fol. 584). He expressly found that buyer had substantially performed the terms and conditions of the contract (fol. 661); that there were at least four and possibly five discrepancies and variations between the letter of credit of the buyer and the contract between the parties (fols. 637-646, 647, 653-655, 656, 658); that such discrepancies and variations were immaterial (fol. 659) and, accordingly, that seller breached the contract (fol. 661) and, that buyer was entitled to general damages, under the contract, at the "time and place that the goods should have been delivered" (fols. 661-662).

He also specifically found that the seller had formally cancelled its contract on January 6, 1955 (fol. 624); that there was a general market for the ore in January and February, 1955 (fol. 670); that by resorting to this market, the buyer could have replaced the undelivered goods • • •

(fol. 670); and that the market price in March was $6.50 a ton higher than the contract price (fol. 662).

The buyer accepted the seller's breach of contract in January. On January 8, the buyer notified the seller that it would give them 24 hours to withdraw its cancellation or "we shall take it * * * that you have committed breach thereof * * *" (fols. 460-462). On January 18, the buyer's representative, Munakata, "went to Devidayal and tried to persuade them to accept a $1.00 increase" (fol. 107). On February 7, the buyer instructed M. W. Hardy & Co., Inc. to purchase the full 8000 tons of Indian Manganese Ore, subject to its approval of the final price (fols. 551-554). On February 14, the buyer applied to the Court for the appointment of an arbitrator (fol. 550). On February 17, the buyer committed itself to a price with M. W. Hardy & Co., Inc. (fols. 490-498).

There was a very substantial rise in the market price of the ore from January 6 (the date of the seller's repudiation) to the end of March (the date utilized by the Arbitrator for determining the buyer's damages). This fact stands uncontradicted and incontrovertible. Not one witness for either side testified otherwise.

By February and March, a witness for the buyer testified "the market had run away with itself" (fol. 414), and another witness for the buyer testified the real shortage and scarcity of the ore came about in March (fols. 139-140). It was in March that an acute shortage sent the market price sky-high. Had the Arbitrator determined the buyer's damages in early January rather than at the end of March, the award would have been at least $23,400 to $32,400 less than it actually was.

The Arbitrator, however, erroneously determined damages as of the end of March, even though he expressly stated and intended to apply the correct principle of law in the said determination (fols. 662-663, 599).

The Manner in Which the Federal Question Sought to be Reviewed was Raised.

The federal question arose when the Court of Appeals denied the petitioner the equal protection of the law. This denial gave the petitioners their first opportunity to raise the federal question now sought to be reviewed.*

ARGUMENT.

The decision of the New York Court of Appeals operates to deny to petitioners the constitutional guaranties of the Fourteenth Amendment.

A. This Court has repeatedly held that judicial acts of state Courts are subject to the prescriptions of the Fourteenth Amendment. In *Shelley* v. *Kraemer*, 334 U. S. 1, 14, 68 S. Ct. 836, 842, Mr. Chief Justice Vinson, writing for the Court, stated:

"In the Civil Rights cases, 1883, 109 U. S. 3, 11, 17, 3 S. Ct. 18, 21, 27 L. Ed. 835, this Court pointed out that the Amendment makes void 'state action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations or 'state authority, in the shape of laws, customs, or judicial or executive proceedings.' "

Whether a specific act violates the constitutional guaranties is to be determined not only by its provisions but, also, by its operation and application. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064. It is also the province of this Court to review a decision of a state court of last resort,

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* In *Saunders* v. *Shaw, et al.*, 244 U. S. 317, this Court (per Holmes, J.) held: "But when the act complained of . . . when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy of infraction for constitutional rights if the party aggrieved in such a way, could not come here. . . ."

where the operation of such decision deprives a litigant of rights guaranteed by the Constitution. *Shelley* v. *Kraemer, supra; Saunders* v. *Shaw, supra.*

B. The law applicable to the determination of the breach of contract is the law of the situs of the execution of the contract whose breach is alleged. The place of execution determines the applicable law. The validity of a breach must be determined by the *lex loci contractus.* The law of the place of the contract acts upon it, independently of any volition of the parties, in virtue of the general sovereignty possessed by every nation to regulate all persons and property and transactions within its own territory.

The contract having been made and executed in India, the law applicable to the breach thereof was Indian law. Moreover, the performance was to be completed in India. The test of a breach must therefore be determined by the law of the situs.

C. The petitioner sought to have the Court below vacate the Arbitrator's award for the reasons that (1) the Arbitrator, although he intended to decide in accordance with law, did not do so and (2) that the Arbitrator expressly intended and invited a review on the basis of the applicable law and the Courts below, did not review on that basis. The intentions of the Arbitrator were expressly stated on the face of the award and therefore the award lacked finality.

The Court has the power and the duty to review and set aside an arbitrator's award for an error in law in those instances where the question of law is stated on the face of the award and where it is clear on the face of the award that the Arbitrator intended to decide in accordance with the law but did not do so.

In *Application of Davis,* 57 N. Y. S. 2d 387, 389, Sp. T., N. Y. Co. (1945), the Court stated:

> "An award must be vacated * * * if the award is mistaken in the application of a rule of law which the award, on its face, has adopted."

The rationale in such cases is simple and meritorious. If it is clear that the Arbitrator intended to decide the matter on the basis of the applicable law, and erred in his decision as matter of law, then "the award is not what the arbitrators themselves intended" (*Fudickar* v. *Guardian Mutual Life*, 62 N. Y. 400).

In the instant case it is not necessary to speculate as to the Arbitrator's "presumed" intent. He expressly stated that he intended the Court to review for error of law; he was not satisfied to state his bare decision in the award; but supplemented it by setting forth his reasons "in full" so that, in his words, "the award may be set aside or modified" if the Court should find "any palpable error of fact or law".

Accordingly, the Arbitrator's intent to "refer the point for the opinion of the Court" and the Court's power and duty to review on the basis of the applicable law to ascertain whether the award is "founded on mistake" is crystal clear.

Where the Arbitrator sets forth the reasons for the award in full for the express purpose of having the Court review for errors of fact and law, the Court is obliged to ascertain the law under Section 1462 (4) of the Civil Practice Act. If the Court does not do so, the award does not and cannot have the requisite finality intended by the Arbitrator or by the Legislature under Section 1462 (4).

In point of fact, the Arbitrator made a palpable and grievous error of law in his determination of the measure of damages. Where an arbitrator expressly intended to decide in accordance with correct principles of law, his

failure to do so, no less than a court's "failure to apply the proper legal measure of damages was a manifest error of law" (*Hutches* v. *Renfroe*, 200 F. 2d 337, 341, C. A. 5th, 1953).

D. The date of the seller's breach is determinative of the time for measuring the damages of the buyer.

The Courts in New York have consistently held under Section 148(3) of the New York Personal Property Law that the time of the breach is the pivotal fact for the determination of damages.

In *Emerman* v. *Cohen*, 199 F. 2d 857, 858 (C. A. 2nd, 1952), the Court stated, applying Par. 148 (3):

> "Since federal jurisdiction rests upon diversity, New York law must control as to the measure of damages. The New York Sales Act provides that if, at the time of breach, there is an available market in which the purchaser can obtain the goods, then his measure of damages shall generally be the difference between that market price and the contract price."

In the last analysis, it is sheer sophistry, under Section 148 (3), to contend that a conceded breach of contract on a certain date, accepted by the buyer, does not establish the time of the breach, even though the party in default had the absolute right to render full performance as of the said date.

The buyer's unequivocal acceptance of an anticipatory breach fixes the buyer's damages as of that time.

Even under principles of anticipatory breach as set forth in *Segall* v. *Finley*, 245 N. Y. 61, the case upon which the Arbitrator relied as an authority, the buyer's damages would accrue at the time the buyer elected "to accept the repudiation as final". Where the buyer chooses to "assent to the abandonment of the contract", certainly then "its

vitality was gone and cease to exist" (*Graves* v. *White, et al.*, 87 N. Y. 463, 466, 1882).

The original contract, accordingly, cannot be held to have survived where "the plaintiff gave notice of an election to treat it as abandoned" and "treating it as abandoned, proposed a new contract" (*Rubber Trading Co.* v. *Manhattan R. Mfg. Co.*, 221 N. Y. 120, 125, 1917).

Where the seller has committed a breach of a contract in which it has an alternative choice as to the time and manner of its performance, the buyer's damages are determined in accordance with the alternative that will result in the smallest recovery to the buyer.

Williston, Contract (Rev. Ed., 1937), Par. 1407, pp. 3920-1, posits the precise principle of law here applicable in respect to an alternative contract, stating:

> "Where • • •; no choice has been made, either expressly by the promisor or automatically by the terms of the contract or by law, the measure of damages for breach of such a contract is the value of the alternative least onerous to the defendant."

The law in New York is in accord with the general principle of law enunciated. In Clark, New York Law of Damages (1925), Vol. I, Par. 166, p. 283, the author states:

> "Where a contract is strictly one in the alternative, as where the promisor agrees to do either one thing or another, and he fails to do either • • • the courts have adopted the rule known as the least beneficial alternative and have limited the promisee's recovery to that which will work the least harm to the defendant; the law in effect elects for him to do that which will be most beneficial to him."

It has been repeatedly held that where a promisor has agreed to alternative performances, in case of breach with-

out an election, the damages are measured by the alternative that will result in the smallest recovery.

The principle that the buyer's damages be in accordance with the seller's alternative which results in the smallest recovery has had wide application and approval in many jurisdictions. (*W. J. Holliday & Co.* v. *Highland Iron & Steel Co.*, 43 Ind. App. 342, 87 N. E. 249 (1909); *Myers* v. *C. W. Toles & Co.*, 287 Mich. 340, 283 N. W. 603 (1939); *Zalis* v. *Walter*, 180 Md. 120, 23 Atl. (2d) 26 (1941); *Godwin* v. *Graham*, 360 Mo. 418, 228 S. W. (2d) 789 (1950); *Ach* v. *Herman A. Straus, Inc.*, 67 Ohio App. 452, 37 N. E. (2d) 99 (1941). Where a party "is bound to do one of two things and does neither, • • • the measure of damages is in general the loss arising by reason of the contractor having failed to do that which is least, not that which is most beneficial to the contractee" (15 American Jurisprudence, Damages, Par. 43, p. 444).

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the constitutional question presented may be settled and determined.

Wherefore, your petitioners respectfully pray for a writ of certiorari to be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding said Court to certify and to send to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings by the Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Honorable Court; that the order of the Court of Appeals

may be reversed, and that petitioners be granted such other and further relief as may be just and proper.

DEVIDAYAL (SALES) LTD.,
Petitioner,

By PETER BELSITO,
Attorney for Petitioner.

PETER BELSITO,
ARNOLD D. NAIDICH,
of Counsel.

APPENDIX.

Judgment of Affirmance.

Supreme Court of the State of New York

COUNTY OF NEW YORK.

IN THE MATTER *of* The Arbitration of Certain Differences between IDA & Co., NEW YORK, INC., Petitioner, *and* DEVIDAYAL (SALES) LTD., Respondent.	Judgment 1959/1955

The above named respondent, DEVIDAYAL (SALES) LTD., having appealed to the Court of Appeals from the Order of Affirmance of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division, First Department, on the 9th day of October, 1956, and from the Judgment of Affirmance, entered herein in the office of the Clerk of the County of New York on the 16th day of October, 1956, pursuant to said Order of Affirmance which judgment unanimously affirmed a final judgment of the Supreme Court, New York County, entered the 2nd day of November, 1955, in the office of the Clerk of the County of New York, in favor of the above named petitioner, IDA & Co., NEW YORK, INC., and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed and judgment rendered for petitioner, IDA & Co., NEW YORK, INC. with

costs and the Remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of New York and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this Court, and directing the entry of a Judgment of Affirmance herein with costs of said appeal to be taxed against respondent DEVIDAYAL (SALES) LTD.,

Now, on motion of Buchter, Rathheim, Abrams & Hoffman, Esqs., attorneys for petitioner, IDA & Co., NEW YORK, INC., it is hereby

ADJUDGED, that the said judgment so appealed from, be and the same hereby is affirmed, and it is further

ADJUDGED, that IDA & Co., NEW YORK, INC. the petitioner herein, with offices at 39 Broadway, New York 6, New York, recover of DEVIDAYAL (SALES) LTD., the respondent herein, with offices at Reay Road, Mazagaon, Darukhana, Bombay 10, India, the sum of $202.79 costs and disbursements of said appeal as taxed herein and that petitioner have execution therefor.

Dated: New York, N. Y., July 22, 1957.

ARCHIBALD R. WATSON,
Clerk.

Filed and docketed

Co Clk N Y. July 22, 1957

11:40 A M

Remittitur of Affirmance.

No. 111

COURT OF APPEALS

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of July in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

Witness,

The Hon. ALBERT CONWAY,
Chief Judge, Presiding,
RAYMOND J. CANNON, Clerk

Remittitur July 3, 1957.

No. 111

IN THE MATTER
of
The Arbitration of Certain Differences between IIDA & Co., NEW YORK,
Respondent,
and
DEVIDAYAL (SALES) LTD.,
Appellant.

BE IT REMEMBERED, that on the 8th day of April in the year of our Lord one thousand nine hundred and fifty-seven, Devidayal (Sales) Ltd., the appellant in this cause, came here unto the Court of Appeals, by Arnold D.

Naidich, its attorney, and filed in the said Court a Notice of Appeal and return thereto from a judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Iida and Co., New York, Inc., the respondent in said cause, afterwards appeared in said Court of Appeals by Buchter, Rathheim, Abrams & Hoffman, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Chester Rohrlich, of counsel for the appellant, and by Mr. Harold M. Hoffman, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office }
Albany, July 3, 1957. }

[SEAL]

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk.